

1734. *February.*SUTHERLAND *against* MURRAY.

No. 38.

Robert Murray disposed his estate of Pulrossie, failing heirs of his body, "to and in favours of John and George Murrays, his brother's sons, and the heirs-male to be procreated of their bodies; which failing, to Sutherland of Clyne," &c.; thereafter he goes on to appoint a division of the estate betwixt the two brothers, into unequal parts. George having died without heirs of his body, the question occurred betwixt his brother John and Sutherland of Clyne, which of them was substitute to him in his proportion of the lands. For Sutherland it was pleaded, That he was substituted to both the brothers in their separate rights, which was clear from the clause, "which failing," in his favours; whereas there was no substitution in the tailzie of the one brother to the other. It was answered, The intention of this tailzie was to preserve an ancient family—"That Sutherland is substituted after the two brothers, and the heirs-male of their bodies," and no otherwise; so that he can have no claim while an heir-male of either of their bodies is alive. The plain intention of the tailzier was to prefer both his nephews, and the heirs-male of their bodies, to Sutherland; which must imply a mutual substitution of the one brother and his heirs to the other brother and his heirs. The Lords found, That Sutherland could not be served heir to George during the life of the brother John, and the heirs-male of his body; and found, That John Murray may proceed in his service to his brother George. See APPENDIX.

*Fol. Dic. v. 2. p. 400.*1736. *February 17.*PATRICK RANKIN *against* JOHN and PATRICK RANKINS.

Patrick Rankin, in his contract of marriage with Margaret Marshall, *anno* 1703, "provided 1000 merks, and whatever should be conquest during the standing of the marriage, to the heirs or bairns lawfully to be procreated betwixt them; and, in case of predeceasing his wife, he thereby assigns to her the life-rent of the equal half of the free moveables."

Of this marriage there were eight children; the eldest of whom, Walter, with consent of his father, entered into a contract of marriage with Margaret Auld, *anno* 1731, wherein he becomes bound, "to provide to himself and spouse, in conjunct fee and life-rent, which failing, to his heirs and assignees, whatever means and estate, both heritable and moveable, that he presently hath, his father shall make over to him, or what he shall happen to get with his wife."

From this contract it did not appear what provision Patrick had given to his son; but it was instructed by a writing holograph of Walter, dated in September, 1732, that his father, at the time of the contract, had bound himself to pay him 1000

No. 39.

Can an heir discharge his right of succession, before it opens?

Import of a clause in a marriage-contract to the heirs or bairns of a marriage.